APPENDIX

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Opinion of June 19, 1968 of United States District Court for the Eastern District of Illinois.

On May 16, 1967, Walter Gabel, William Katz, Ben Peters, Ed Ungrund, Dean Addis and Harry Bail, employees of Davidson Masonry & Restoration, Inc., an Illinois Corporation, were preparing to do masonry work on an addition to the Moore Business Forms, Inc., plant at Charleston, Illinois. Masonry walls had been erected and steel bar joists were in place in order to receive the metal deck and roof on the addition being built. The six masons had placed planks on the bar joists and had loaded the planks with mortar and blocks in preparation to block in around the bar joists. While the men were upon the planks placed upon the joists, the platform, mortar, blocks and men fell to the floor of the building. Each of the men sustained personal injury.

On October 10, 1967, Walter Gabel filed his complaint in this court seeking damages for personal injuries sustained in the fall. Thereafter, on November 9, 1967, the plaintiff in the instant action, Cunningham Brothers, Inc., a Wisconsin Corporation, filed a complaint in this court naming Walter Gabel, Harry Bail, William Katz, Ben Peters, Ed Ungrund, Dean Addis and Davidson Masonry & Restoration, Inc., as Defendants. The action was based upon diversity of citizenship. It was alleged that Cunningham Brothers, Inc., was a Wisconsin corporation and all other defendants were Illinois citizens. The plaintiff in this case alleged that on February 10, 1967, it had entered into a contract with Moore Business Forms, Inc., to act as general contractor to build an addition to a plant in Charleston, Illinois, within the Eastern District of Illinois.

The complaint alleged that Davidson Masonry & Restoration, Inc., an Illinois Corporation, submitted a bid for masonry work on the addition to the Moore Business Forms, Inc., building on March 27, 1967, and that thereafter, a purchase order was issued by the plaintiff to Davidson Masonry & Restoration, Inc., on April 6, 1967.

It was alleged that it was that work represented by the bid and purchase order in which the six individual defendants were engaged at the time the platform fell causing the six individual defendants injury.

Plaintiff's complaint is in three counts allegedly brought pursuant to the provisions of §2201 of Title 28, U.S.C. In Count I, plaintiff asks the court to declare that plaintiff did not "have charge of" the erection, construction, repairing, alterations, removal or painting on the physical plant under construction at Moore Business Forms, Inc., within the construction and meaning of the provisions of the Structural Work Act of Chapter 48, Illinois Revised Statutes, and further prayed that the court decree that the six individual defendants have no cause of action under the Structural Work Act against the plaintiff for any damages sustained by them as a result of the injuries received from the fall of May 16, 1967.

Plaintiff requests that the court order and decree that Davidson Masonry & Restoration, Inc., is, by reason of its contract, liable to indemnify and hold the plaintiff harmless for any sums that the individual defendants might recover against the plaintiff for injuries received on May 16, 1967, under Count II of the complaint.

In Count III, Plaintiff requests that the court declare that the negligence of the plaintiff, if any, was passive only and that the negligence of the defendant, Davidson Masonry & Restoration, Inc., was active and that there-

fore, the corporate defendant is obliged to indemnify and hold the plaintiff harmless for any sums which the individual defendants may recover against the plaintiff by reason of the injuries sustained on May 16, 1967.

Defendant, William Katz, answered Count I of plaintiff's complaint and denied that the work performed by Katz was under the supervision and control of Davidson and denied that the plaintiff had no right of control over the project and denied that the plaintiff was not in charge of the work.

Katz then filed his counterclaim against the plaintiff, Cunningham Brothers, Inc., and Moore Business Forms, Inc., seeking damages for personal injuries sustained by reason of claimed violations of the Structural Work Act, that is, Sections 60-69, Chapter 48, Illinois Revised Statutes. Trial by jury was requested.

Defendants, Walter Gabel, Ben Peters, Ed Ungrund, Dean Addis, and Davidson Masonry & Restoration, Inc., filed a Motion to Dismiss and, in the alternative a request to the court to decline declaratory judgment. In that Motion, these defendants pleaded that there was another action pending commenced by Walter Gabel against Cunningham Brothers, Inc., based upon the same state of facts as alleged in the plaintiff's complaint for declaratory judgment and these defendants contended that that action would effectively and completely adjudicate all of the issues raised in the plaintiff's complaint.

These defendants also contended that the issues raised in plaintiff's complaint could be resolved and adequately determined in the usual and adequate remedy available to all parties and contended that the maintenance of an action for declaratory judgment would result in a duplication of litigation. Additionally, it was claimed that the action for

declaratory judgment was merely an attempt on the part of the plaintiff to initiate a defense in the action presently pending by defendant Gabel and was for the purpose to enable the negligence action defendant to obtain a declaration of non-liability.

The defendant, Harry Bail, filed his Motion to Dismiss the complaint for declaratory judgment contending that the action was premature in that he had made no demand upon the plaintiff or any of the co-defendants. Bail also contended that he was not a party to any agreement between plaintiff and defendant, Davidson Masonry & Restoration, Inc., and so would not be bound by the terms of the contract and contended that his rights should be determined upon the basis of the rules of law relating to violations of the Structural Work Act. Thus, Bail contends that a complete and adequate remedy would be available to the plaintiff at any time a cause of action might be asserted by Bail against the plaintiff relative to plaintiff's liability for negligent conduct or violation of the Structural Work Act. Bail also contended that the owners of the work and the architect in charge of the construction were necessary parties and were not before the court and so, contended that the cause should be dismissed.

Plaintiff, Cunningham Brothers, Inc., thereafter served Interrogatories upon all parties and filed a Motion to consolidate the action brought by Gabel with the instant action. Objections to Interrogatories by all of the defendants except the defendant Katz were filed.

Plaintiff contends that this action is a proper one for declaratory judgment. All parties agree that granting of declaratory relief is a matter which lies within the sound discretion of the court to be reasonably exercised in furtherance of the purposes of the statute. *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237 (Utah,

1952); *Crosley Corporation* v. *Westinghouse Electric & Mfg. Co.*, 130 F. 2d 474; *Western Supplies Co.* v. *Freeman*, 109 F. 2d 693. This discretion is a discretion in determining whether to exercise its jurisdiction in a declaratory judgment action proceeding. *States Steamship Co.* v. *Featherstone*, 240 F. Supp. 830 (Ore., 1965).

No party to this litigation has presented to the court a case wherein a court has granted the type of declaratory relief requested in this case. As a matter of fact, no party has shown the court wherein such a request has heretofore been made. This court believes that the dearth of authority can be easily explained. According to traditional concepts of negligence litigation, the right to determine whether or not a party will litigate, settle or abandon a claim, and the right to select the venue and time for bringing such a claim, has heretofore belonged to the plaintiff. There has been no compulsion upon an injured party to settle or litigate upon penalty of being deprived of a substantial right. This court is of the opinion that such would be the effect if this court were to entertain this action. Traditional remedies are available to all parties. Thus, there would appear to be no good reason to abandon well established procedures in favor of a declaratory judgment action when such an action is by its nature intended to be supplemental and not a substitute for other existing remedies. *Western Casualty & Surety Co.* v. *Beverforden*, 17 F. Supp. 928 (Western Dist., Mo. 1936). The action brought by the plaintiff seeks to adjudicate issues which can be adjudicated in the action first filed by defendant Gabel. That being so, there would seem to be no reason why still another action should be brought involving the same issues. *Fireman's Fund Ins. Co.* v. *Hanley*, 140 F. Supp. 206 (Western District, Mich., 1956); *Franklin Life Ins. Co.* v. *Johnson*, 157 F. 2d 653.

The Federal Declaratory Judgment Act furnishes a convenient vehicle to adjudicate issues arising before a wrongful act has been committed or before a cause of action in its usual and ordinary form already exists but the remedy is not appropriate as a substitute for traditionally available remedies where a cause of action has already matured. Especially this is true in the negligence field. It has been observed that the practice of seeking declaratory judgments in areas where it was never intended that the remedy should be available might well cause Congress to repeal the Declaratory Judgment Act. *Indemnity Ins. Co. of North America* v. *Schriefer,* 142 F. 2d 851 (C.C.A. 4th Cir. 1944). If this court should countenance the action taken here and should determine to grant declaratory relief, there would be no logical reason to refuse to decline declaratory relief in every negligence action where diversity exists. This court declines to usurp, pre-empt or foreclose the right of litigants to pursue traditional remedies which are adequately and readily available. Rather, in the exercise of the judicial discretion reserved to this court to grant or decline declaratory relief, this court declines to exercise jurisdiction and unwarrantedly extend supervision over disputes which should not find their way into the federal judiciary. Each litigant will surely have his day in court by virtue of the prior pending action. There is no good reason to allow one party to compel another party to have several days in court when one would suffice. Each party is entitled to any proper defense and tactic in the handling of his litigation. However, needless expensive, repetitive or coercive litigation will be excluded from the armory of judicial combat by this court. The court notes that there is no provision under Illinois law, whereby this plaintiff could force any of the injured defendants to assert a claim or litigate. Yet the plaintiff's right to litigate the issues presented here cannot be questioned when such issues are presented in a

proper court and at a proper time, and each issue could be properly presented in the action pending between Gabel and the plaintiff.

If this court were to allow this action to stand, the necessary result would be to force six injured persons to bring counterclaims for damages in this suit for declaratory judgment. By virtue of the counterclaim already filed by defendant Katz, this court has been requested to assess damages and the court has been requested to join still another party defendant. "The law is well established that the determination and assessment of damages are not the primary purpose of a declaratory judgment action. In 15 Cyclopedia of Federal Procedure, 3d Ed., §90.22, p. 827, it is stated: 'It is not the function of a declaratory judgment action, and it does not lie, to recover damages.' " *Fireman's Fund Ins. Co.* v. *Hanley,* 140 F. Supp. 206, 213.

The issues which are presented in plaintiff's complaint can better be decided in the prior suit presently pending in this court which was commenced by the defendant Gabel. Therefore, this court will decline to grant declaratory relief as prayed and the cause should be dismissed without prejudice to the plaintiff's right to assert any proper defense in any action which may be brought as a result of the incident of May 16, 1967. For these reasons, plaintiff's complaint is dismissed without prejudice to the plaintiff, but at plaintiff's costs.

The counterclaim filed by William Katz is also dismissed without prejudice to the defendant Katz to file his action in such appropriate venue as he shall select at such time as he may choose. Counsel for defendant Gabel will draw an order in accordance with the views expressed herein.

Entered this 19 day of June, 1968.

United States District Court
/s/ Henry S. Wise

Opinion of March 10, 1969 of United States Court of Appeals for the Seventh Circuit.

Before CASTLE, *Chief Judge,* CUMMINGS and KERNER, *Circuit Judges.*

CASTLE, *Chief Judge.* Plaintiff brings this appeal from the district court's dismissal of its three-count complaint filed against the individual and corporate defendants under the Declaratory Judgment Act, 28 U.S.C. §2201.[1] Plaintiff had contracted as general contractor to construct a building for Moore Business Forms, Inc., at Charleston, Illinois. Defendant, Davidson Masonry and Restoration, Inc., was engaged by plaintiff as the masonry subcontractor for the job, and the individual defendants were employees of Davidson who were injured when the platform on which they were standing collapsed.

Defendant Gabel filed a complaint for personal injuries against plaintiff in the district court on October 1, 1967, plaintiff filed its declaratory judgment complaint on November 9, 1967, defendant Katz counterclaimed in the declaratory judgment suit, and at least one of the other individual defendants has since filed suit against plaintiff in a state court. The individual defendants have based their actions on the Illinois Structural Work Act, Ill. Rev. Stat., 1965, Ch. 48 §60 et seq.

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[1] §2201 Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Count I of plaintiff's complaint is directed against the individual defendants only and seeks a declaration that plaintiff did not "have charge of" the work being performed by these defendants at the job site, within the meaning of the Illinois Structural Work Act, and that those defendants have no "cause of action" against plaintiff under the Act for any personal injuries they may have sustained on the date of the accident. Counts II & III of the complaint are directed only against Davidson Masonry & Restoration, Inc. Count II seeks a declaration that Davidson, by reason of its contract with plaintiff, is liable to indemnify and hold plaintiff harmless for any amount which may be recovered against plaintiff by the individual defendants. The district court dismissed the complaint and held that the action was inappropriate for declaratory relief.

Plaintiff contends that the district court erred in dismissing the complaint since an action by a potential tort defendant against the potential plaintiffs should fall within the purpose of the Declaratory Judgment Act. Thus, instead of having to wait and be sued in different state and federal forums by the various injured parties, plaintiff argues that it should be allowed to bring them together in one action, along with the alleged indemnitor, and thereby adjudicate the rights of all the parties at one time and place.

We hold that the district court was correct in dismissing the complaint, and accordingly affirm the judgment below.

Regarding the individual defendants, we are of the opinion that to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tortfeasor would be a perversion of the Declaratory Judgment Act. The primary purpose

of that Act is "to avoid the accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damages had accrued." *Edelman & Co.* v. *Triple-A Specialty Co.*, 88 F. 2d 852, 854 (7th Cir. 1937). See also *Milwaukee Gas Specialty Co.* v. *Mercoid Corp.*, 104 F. 2d 589, 591-592 (7th Cir. 1939); *Luckenbach S. S. Co.* v. *United States*, 312 F. 2d 545 (2d Cir. 1963); 6A Moore's Fed. Practice ¶57.06, p. 3021-22 (1966).

Since it is not contended that the present action was brought to avoid damages which would accrue if a certain course of conduct were taken in the future, plaintiff must establish that this suit falls within some other purpose of the Declaratory Judgment Act. Plaintiff attempts to support its action by arguing that the purpose of the Act is not confined solely to settling controversies before they ripen into legal liabilities, but is broad enough to permit the determination of rights which have arisen due to an alleged negligent act which has already occurred. Plaintiff also contends that this action was not brought to determine the issue of negligence, but only to determine the rights of the parties under the contracts between them so as to avoid multiplicity of action.

However, plaintiff has failed to demonstrate how the allowance of the instant declaratory judgment action would "effectuate the purpose of the statute and thereby afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Sears, Roebuck & Co.* v. *American-Mutual Liability Co.*, 372 F. 2d 435, 438 (7th Cir. 1967); *American Auto Insurance Co.* v. *Freundt*, 103 F. 2d 613, 619 (7th Cir. 1939); *Aetna Casualty & Surety Co.* v. *Quarles*, 92 F. 2d 321, 324 (4th Cir. 1937). Rather, regarding the individual defendants,

plaintiff seems to be attempting to "try issues or determine the validity of defenses in pending cases," as was condemned by *Freundt* and *Quarles, supra.*

Moreover, couching the suit in terms of contract rather than tort does not change the nature of the action. The issue of plaintiff's negligence would necessarily be tried, since the individual defendants would be compelled to counterclaim under Rule 13(a), Fed. Rules Civil Proc. Rules 20(b) and 40(b), regarding separate trials, would be of little value to these defendants, since plaintiff's liability, if any, would be determined in the primary action.

Thus, there is good reason for the noted lack of precedent supporting plaintiff's position. To allow a declaratory judgment action under the facts before us would be to allow a substitute for the traditional procedures for adjudicating negligence cases. We agree with the conclusion reached in *Sun Oil Co.* v. *Transcontinental Gas Pipe Line Corp.*, 108 F. Supp. 280, 282 (E.D. Pa. 1952), aff'd. (adopting opinion of district court), 203 F. 2d 957 (3d Cir. 1953), that "it is not one of the purposes of the declaratory judgment acts to enable a prospective negligence action defendant to obtain a declaration of nonliability."[2]

To so reverse the roles of the parties would affect more than merely the form of action, but would jeopardize those procedures which the law has traditionally provided to injured parties by which to seek judicial relief. Although "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate," Rule 57, Fed. Rules Civil Proc., we hold that such relief is inappropriate in the instant case

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[2] Of course, non-liability may be declared in appropriate cases *State Farm Mutual Auto Ins. Co.* v. *Mosey*, 195 F. 2d 56 (7th Cir. 1952), cert. den. 344 U.S. 869.

since "more effective relief can and should be obtained by another procedure." *Chicago Metallic Mfg. Co.* v. *E. Katzinger Co.*, 123 F. 2d 518, 520 (7th Cir. 1941).

Although our holding may require the plaintiff here to litigate a number of lawsuits with the injured parties, we feel that this result does not outweigh the right of a personal injury plaintiff to choose the forum and the time, if at all, to assert his claim. We agree with plaintiff that a declaratory judgment action should not be dismissed solely because a more traditional remedy is available. Otherwise, many justiciable declaratory judgment actions would be dismissed on that ground. However, when the traditional remedy provides the parties with the procedural safeguards required by the law to insure the availability of a proper remedy, the courts, in exercising their discretion,[3] may properly dismiss the declaratory judgment action. Since the sustaining of plaintiff's suit in the instant case would force an injured party to litigate a claim which he may not have wanted to litigate at a time which might be inconvenient to him or which might precede his determination of the full extent of his damages, and in a forum chosen by the alleged tortfeasor, we hold that the action was inappropriate for declaratory relief and was therefore properly dismissed against the individual defendants.

There remains the issue of whether plaintiff may seek declaratory relief against the corporate defendant (Davidson), the alleged indemnitor. Initially, two observations

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[3] It is well-established that declaratory relief is discretionary, *Brillhart* v. *Excess Inc. Co.*, 316 U.S. 491, 494 (1942), although a reviewing court may substitute its own judgment for that of the trial court if the latter court's exercise of its discretion is "erroneous." *Sears Roebuck & Co.* v. *American Mut. Liab Ins. Co.*, 372 F. 2d 435, 438 (7th Cir. 1967).

should be made. First, there is no indemnity clause contained in the contract, and plaintiff's claim against Davidson seems to be really based on a common law indemnity theory. Second, during oral argument, counsel for plaintiff stated that if we held that the individual defendants should be dismissed, then the plaintiff would probably rather file a third-party complaint against Davidson in the Gabel action, to determine the issue of indemnity. Irrespective of this concession, we are of the opinion that plaintiff could not maintain a declaratory judgment action against Davidson alone.

"Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Co.*, 312 U.S. 270, 273 (1941); See also *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239-242 (1937).

It has been held that when an insured is being sued for damages and calls upon his insurer to indemnify and defend the suit, the insurer is "entitled to be advised by a declaratory decree whether it is obligated to defend and indemnify the insured against the claim upon which the suit is brought." *C.Y. Thomason Co.* v. *Lumbermen's Mutual Casualty Co.*, 183 F. 2d 729, 733 (4th Cir. 1950); *Sears, Roebuck & Co.* v. *American Mut. Liab. Ins. Co.*, 372 F. 2d 435, 440 (7th Cir. 1967).

However, in the normal indemnity situation, where, as here, no contractual duty to defend exists, no duty to do anything arises until the alleged indemnitee is adjudged liable. Thus, in the instant case, there is no immediate controversy between the parties since it is not certain

that plaintiff will ever be compelled to pay any judgment for which Davidson could be held liable as indemnitor. See *National Valve Mfg. Co.* v. *Grimshaw*, 181 F. 2d 687, 689 (10th Cir. 1950). In these circumstances we hold that the interests of justice would not be served by entertaining a declaratory judgment action at this time.

For the foregoing reasons, the judgment below is affirmed.

AFFIRMED.